

SUPPLEMENTAL RESPONSE TO DEFENDANT'S MOTION TO STRIKE JURY PANEL

The requirement that prospective jurors speak and read the English language is constitutional. The Jury Commissioner does not need to provide interpreters for prospective jurors who do not speak English.

The State of Arizona, through undersigned counsel, supplements its response opposing the defendant's request to strike the jury panel. The defendant argues that the Maricopa County Jury Commissioner unlawfully excludes non-English speaking Hispanic citizens from serving on juries. She argues that because *Oregon v. Mitchell*, 400 U.S. 112 (1970)¹, precludes the use of English literacy tests as a requirement for voting, it is also unlawful to use English language requirements for jury service. The defendant's argument fails as a matter of law and this Court should deny relief without an evidentiary hearing.

I. English proficiency requirements for jury service are constitutional.

The defendant attempts to link the unconstitutional English literacy requirement for voting with the qualification of jurors. The right of qualified citizens to vote is a fundamental constitutional right. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). However, eligibility for jury service is not a fundamental right protected by the constitution. *United States v. Flores-Rivera*, 56 F.3d 319, 326 (1st Cir. 1995); *United States v. Conant*, 116 F.Supp.2d 1015, 1020 (E.D. Wis. 2000).

It has long been accepted that the Constitution does not forbid the States to prescribe relevant qualifications for jurors. *Carter v. Jury Commission*, 396 U.S. 320, 332-33 (1970). Every court that has confronted an English proficiency requirement for jury

¹ *Oregon v. Mitchell's* holding concerning extending the voting franchise to citizens over the age of eighteen years was later superseded by the 26th Amendment

service has upheld the requirement as constitutional. *State v. Gibbs*, 254 Conn. 578, 597, 758 A.2d 327, 340 (2000); see *United States v. Escobar-de Jesus*, 187 F.3d 148, 166 (1st Cir. 1999) (requirement “that jurors be able to speak the English language and be able to read, write and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form”); *United State v. Rioux*, 97 F.3d 648, 659 (2d Cir. 1996) (“[t]he requirement that jurors speak English is unquestionably reasonable”); *People v. Lesara*, 206 Cal.App.3d 1304, 1309, 254 Cal.Rptr. 417 (1988) (“[n]or is the exclusion of insufficient English-speaking citizens abhorrent to the democratic ideals or trial by jury”); *State v. Ji*, 251 Kan. 3, 9, 832 P.2d 1176 (1992) (“[j]urors must have a reasonable knowledge of the language in which the proceedings are conducted to enable them to perform their duties”); *Commonwealth v. Tolentino*, 422 Mass. 515, 522 n. 8, 663 N.E.2d 846 (1996) (“the requirement that conduct of judicial affairs be in English is both reasonable and important”)

Even when an English-only requirement systematically excludes a certain portion of the population, courts have held that “the overwhelming national interest served by the use of English in a United States court justifies conducting proceedings in the District of Puerto Rico in English and requiring jurors to be proficient in that language.” *United States v. Flores-Rivera*, 56 F.3d 319, 326 (1st Cir. 1995); see also *United States v. Aponte-Suarez*, 905 F.2d 483, 492 (1st Cir. 1990).

Arizona courts have held that the requirement that a person read and write English could constitutionally bar a person who could not do so from serving as a juror. *State v.*

Sanderson, 182 Ariz. 534, 538, 898 P.2d 483, 487 (App. 1995); *State v. Cordero*, 174 Ariz. 556, 560, 851 P.2d 855, 859 (App. 1992); *State v. Cordova*, 109 Ariz. 439, 441, 511 P.2d 621, 623 (1973). In *Cordova*, the court reasoned:

English is the language ... in which the court's business is transacted and it is imperative that those who participate in the State's judicial system have a working knowledge of the English language. It would be an undue burden upon the State court system to have to translate for non-English speaking or reading jurors the proceedings conducted and written exhibits presented either before the grand jury or in the court of law itself.

Id.

This finding has been reiterated in every decision holding the exclusion from jury service of non-English speaking citizens constitutional. In *State v. Gibbs*, 254 Conn. 578, 599, 758 A.2d 327, 341 (2000), the court held that "... the State's interest in ensuring that jurors are capable of understanding the judicial proceedings is compelling, and the English proficiency requirement is narrowly tailored to serve that interest."

The mere fact that a person may not be proficient in English says nothing about their race, nationality, or other impermissible basis for exclusion of that person from jury service. The defendant attempts to categorize English proficiency as an unreasonable basis for exclusion by appealing to 42 USCA § 2000d-1, an executive order promulgated by President Clinton in August 2000. That order seeks to improve access to federally assisted programs and activities for persons who are limited in their English proficiency. The last section of that order, however, states that the order is intended *only* to improve the internal management of the executive branch of the federal government and "does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agency, its officers or employees, or any person."

The defendant's argument further fails because it excludes non-English speakers who are not Hispanic. Even if the defendant's argument had merit, her position would exclude jurors based on national origin. Arizona citizens speak many different languages; and some do not speak at all but instead use sign language. And not everyone who speaks a language can read that language. Because the defendant's contentions are not restricted to those persons who may be capable of *reading* any of those languages, presumably the Jury Commissioner would be required to communicate with each individual in their particular language of proficiency. Thus, in order to reach all persons who are non-English speakers, the Jury Commissioner would be required to send written *and oral* summonses and jury questionnaires in many different languages – not just Spanish. The defendant's proposals are unworkable.

II. The defendant fails to show that non-English speakers are a cognizable group.

The defendant argues that the exclusion of non-English speakers from jury service violates the constitutional rights of this “class” of individuals. She argues that non-English speaking individuals are a cognizable class in the community. The defendant limits her argument to Hispanic citizens who do not speak English. (Defendant's Motion at 5.)

In order to make a *prima facie* showing of constitutional invalidity, the defendant must establish that a “distinctive” or “cognizable” group in the community has been improperly excluded. *Duren v. Missouri*, 439 U.S. 357, 364 (1979). The members of the group must share a common perspective arising from their life experience in the group. See *Ballard v. United States*, 329 U.S. 187 (1946) (women found to be a distinct, cognizable group); *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (daily wage earners found to be distinctive group); *Rubio v. Superior Court*, 24 Cal.3d 93, 593 P.2d 595 (1979) (ex-felons

found to be cognizable group). Non-English-speaking citizens have not been found to be a distinct, cognizable group. *People v. Lesara*, 206 Cal. App. 3d 1304, 1309, 254 Cal.Rptr. 417 (1988).

The defendant fails to show that non-English speakers are a distinct and cognizable group. She fails to provide any evidence that this group of citizens act as a class or share a common perspective. Moreover, the defendant fails to provide any evidence showing the percentage of the community made up of non-English-speaking citizens. The benchmark for a Sixth Amendment fair-cross-section requirement is that the defendant must demonstrate the percentage of the community made up of the group alleged to be underrepresented. The defendant has failed to provide this evidence.

III. Exclusion of non-English speakers from jury service does not violate equal protection.

The defendant finally argues that exclusion of non-English speakers from jury service violates the equal protection clause of the United States and Arizona Constitutions. She claims that other disabled individuals, namely the hearing impaired, are afforded interpreters while non-English-speaking Hispanics are not. This claim has no merit.

The equal protection clause of the Arizona Constitution provides: “No law shall be enacted granting to any citizen ... privileges or immunities which, upon the same terms, shall not equally belong to all citizens” Ariz. Const. art. 2, § 13. This provision requires only that the State classify reasonably and afford equal treatment to similarly situated persons. *Shelby Sch. v. Ariz. State Bd. of Educ.*, 192 Ariz. 156, 169, ¶ 65, 962 P.2d 230, 243 (App. 1998).

Citizens with disabilities are not similarly situated to those who cannot speak the English language. The inability to communicate in English may be a legitimate nondiscriminatory reason for unequal treatment under either federal or state law. See *Xieng v. Peoples Nat'l Bank*, 63 Wash. App. 572, 579, 821 P.2d 520, 524 (1991) (citing *Fragante v. City & County of Honolulu*, 888 F.2d 591, 595 (9th Cir. 1989)). A person who is hearing impaired is hardly situated similarly to a person who does not speak English. The hearing impaired person can communicate in English and can read English without the assistance of an interpreter. Other courts have held that non-English speakers are not similarly situated to the physically impaired. See *State v. Gibbs, supra*, 254 Conn. 578, 600, 758 A.2d 327, 342 (2000); *State v. Marsh*, 106 Wash. App. 801, 810, 24 P.3d 1127, 1132 (2001); *People v. Lesara, supra*, 206 Cal.App.3d at 1310, 254 Cal. Rptr 417, 420 (1988).

IV. Conclusion

Every court that has confronted an English proficiency requirement for jury service has upheld the requirement as constitutional. The State has a compelling, reasonable interest in requiring juror proficiency in the English language. The defendant further fails to show that non-English speakers are a cognizable and distinct class within the community. The exclusion of non-English speakers is not a violation of equal protection. As a matter of law, the defendant's claim that the exclusion of non-English speaking individuals is unconstitutional fails and this Court should deny relief without holding an evidentiary hearing.